THE LIABILITY OF AN INACTIVE CO-TRUSTEE

PLURAL trustees are perhaps the rule rather than the exception. Where the trust estate is large, settlors usually desire the combined skill and judgment of several men. One trustee may be selected on account of his reputation for honesty and acumen, another because of business association with the settlor, and still a third from motives of relationship. In these co-trusteeships inequality of experience, ability, prudence and initiative is of course common. Such disparities are illustrated in the cases where one trustee was a solicitor and the other was a linen-draper,[1] or a retired physician,[2] or the settlor's widow; [3] or where the trustees consisted of a man in active life and another of great age,[4] the settlor's son and the son's clerk,[5] an able-bodied person and one of advanced years and poor eye-sight,[6] or the settlor's widow and a man.[7]

Where there is inequality of position among trustees, as well as in some instances of equal standing, there is often found inequality of participation in the management of the trust. Frequently one trustee takes complete control of the trust and the co-trustee performs no act under it, or at least none but formal acts. The passive trustee, though accepting the trust, undertakes no responsibilities under it and idly surrenders the trust property and powers to his more energetic, more skillful, or less occupied co-trustee. In numerous cases this assumption of control by one trustee has resulted disastrously to the *cestui que trust*. Through the dishonesty or inaptitude of the managing trustee the trust fund has been reduced or altogether dissipated. In this situation the active trustee is frequently insolvent or financially irresponsible and the only hope of the *cestui que trust* is a claim against the passive trustee.

[1] *In re* Turner, [1897] 1 Ch. 536.
[2] *In re* Linsley, [1904] 2 Ch. 785.
[3] *In re* Partington, 57 L. T. R. 654 (1888).
[4] Darnaby *v.* Watts, 13 Ky. L. R. 457 (1891).
[5] Birely's Estate, 7 Pa. Dist. R. 395 (1898).
[6] Ashley *v.* Winkley, 209 Mass. 509, 95 N. E. 932 (1911).
[7] Greiner's Estate, 20 Pa. Dist. R. 762 (1911).

Thus has been presented the rather troublesome question to what extent an inactive trustee shall be held liable when the trust estate has been diminished by the negligence or defalcation of an active co-trustee.

There is, unfortunately, a lack of unanimity among judges and writers in the wording of a rule to govern this case, as well as among the courts in its application.

In 1634 the Lord Keeper stated the rule to be that the inactive trustee was not liable "unless some purchase, fraud, or evil dealing appear." [8] This doctrine seemed to limit the liability to cases of practical joinder by the passive trustee in a breach of trust by the active trustee.[9]

In 1837 we find a Tennessee court making the rule depend upon the discretionary or directory nature of the trust.

"A discretionary trust is, when by the terms of the trust no direction is given as to the manner in which the trust fund shall be vested, till the time arrives at which it is to be appropriated in satisfaction of the trust. In such cases in order to charge a trustee for an abuse by his co-trustee, some act of commission must be shown on his part, by which the trust fund was attained by his co-trustee, or some act of commission [omission?] amounting, to gross neglect in permitting the fund to be wasted. . . . A directory trust is when by the terms of the trust the fund is directed to be vested in a particular manner, till the period arrives at which it is to be appropriated. In such cases if the fund be not vested, or vested in a different manner from that pointed out, it is an abuse of trust for which both trustees are responsible, though but one received the money, because both are bound to attend to the directions of the trust, and must be careful to execute it faithfully, according to its terms and the intention of the person by whom it was created." [10]

A Pennsylvania judge in 1843 thus formulated the doctrine:

"It is said to be the harshest demand that can be made in equity, to compel a trustee to make up a deficiency, where the money has not

[8] Townley *v.* Sherborne, J. Bridgman, 35, 37. To the effect that agreement to be bound and coöperation and connivance are the only grounds of liability, see Stowe *v.* Bowen, 99 Mass. 194 (1868).

[9] Obviously actual joinder in a breach renders a trustee liable. Walker *v.* Symonds, 3 Swanst. 1 (1818); Sandford *v.* Jodrell, 2 Smale & Giff. 176 (1854); Costello *v.* O'Rorke, Ir. Rep. 3 Eq. 172 (1869).

[10] Turley, J., in Deaderick *v.* Cantrell, 10 Yerg. (Tenn.) 263, 269, 270, 272 (1837).

come into his hands. In such a case, equity will not charge him unless he has been guilty of negligence so gross as almost amounts to fraud." [11]

In 1852 we find Sir John Romilly, Master of the Rolls, saying that "giving one trustee the sole and absolute control over the fund, was a breach of trust." [12] By this rule affirmative action by the passive trustee giving the active trustee entire control seemed to be all that was necessary to establish liability.

Leading text writers cite the rule, where unaffected by statute, to be that "one trustee shall not be liable for the acts or defaults of his co-trustee." [13] This statement might imply that the positive wrongdoer alone was liable for the results of his negligence or fraud.

In 1871 a Canadian judge asserted that "the present rule is, that if a trustee knowing of a breach of trust by his co-trustee, or having means of knowledge by the exercise of ordinary vigilance, stands by and permits such breach of trust to go on, he is accountable therefor, equally with the person actively guilty: . . ." [14] Actual or constructive notice of an existing breach of trust is a prerequisite to liability under this rule.

In 1895 the position was taken by the New York Court of Appeals that an inactive trustee is only liable if he "unnecessarily do an act by which the funds are transferred from the joint possession of all to the sole possession of one," and it was said that "an act is unnecessary when done outside of the usual course of business pertaining to the subject." [15]

In 1911 a Massachusetts court declared that "It is well settled, that a trustee is not responsible for the acts or misconduct of a co-trustee in which he has not joined, or to which he does not consent, or has not aided or made possible by his own neglect." [16]

Thus, the basis of liability has been variously defined as fraud,

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[11] Bell, J., in Nyce's Estate, 5 W. & S. (Pa.) 254, 255, 256 (1843). See also Boyd's Ex'rs *v.* Boyd's Heirs, 3 Gratt. (Va.) 113 (1846), and Stell's Appeal, 10 Pa. 149 (1848).

[12] Wiglesworth *v.* Wiglesworth, 16 Beav. 269, 272 (1852). To the same effect is Rodbard *v.* Cooke, 36 L. T. N. S. 504, 505 (1877).

[13] LEWIN, TRUSTS, 11 ed., p. 294; PERRY, TRUSTS, 6 ed., § 415.

[14] Boyd, Master in Ordinary, in City Bank *v.* Maulson, 3 Chanc. Ch. R. (U. C.) 334, 339 (1871).

[15] Purdy *v.* Lynch, 145 N. Y. 462, 473, 40 N. E. 232 (1895). A similar view is expressed in Crowe *v.* Craig, 29 Nov. Sc. 394 (1897).

[16] Ashley *v.* Winkley, 209 Mass. 509, 528, 95 N. E. 932 (1911).

entrusting of control, gross negligence, entrusting of control after notice of breach, unnecessary entrusting of control, and ordinary neglect. This disorder, further illustrated by an analysis of the decisions in England and America, affords some support for the assertion of Woodward, J., in *Irwin's Appeal*[17] that "there is, perhaps, no one subject on which English authorities are so contradictory and irreconcilable as upon the question, when is one trustee or executor liable for moneys that have been lost in the hands of a co-trustee or executor."

The decisions may, perhaps, be placed in four classes, namely, (a) those in which the inactive trustee has done nothing but *passively allow* his co-trustee to assume exclusive possession of the trust property; (b) those in which the sole basis of the inactive trustee's alleged liability is an *affirmative act* on his part giving the active trustee exclusive possession; (c) cases in which there is an entrusting of possession by positive or negative conduct and, in addition, a failure to supervise the administration of the trust after the co-trustee has taken exclusive control; (d) instances in which the entrusting of exclusive possession was followed by notice to the inactive trustee of a possible specific danger to the trust fund, and thereafter by continued inaction by the passive trustee.

Passively Allowing Co-Trustee to Take Exclusive Possession

The earliest case raising the question of an inactive trustee's liability is *Townley* v. *Sherborne*.[18] There a trustee who had passively allowed his fellow trustee to receive the rents of the trust realty was held not liable when the funds were lost, the Lord Keeper saying that the passive trustee was not responsible in the absence of some "purchase, fraud or evil dealing" in allowing the co-trustee exclusive possession of the rents,

"for they being by law joyntenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by; and it being the case of most men in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part

[17] 35 Pa. 294, 295 (1860). For a further remark as to the uncertainty of the law on this subject see Pim *v.* Downing, 11 S. & R. (Pa.) 66, 71 (1824).

[18] J. Bridgman, 35 (1634).

of their real estate, to make up the same, either by the sale, or perception of profits; and if such of these friends, who carry themselves without fraud, should be chargeable out of their own estate for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust. And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall by law charge him only, and not his co-executor: and in that case, *equitas sequitur legem*, there having been many presidents resolved in this court, that one executor shall not answer nor be charged for the act or default of his companion. And it is no breach of trust, to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits." [19]

This early case, which treated exclusive possession by one trustee as natural and the liability of a trustee as confined to his own receipts, in the absence of fraud, has been followed by many English decisions.[20] This rule has also been applied to passively allowing the co-trustee to have the exclusive possession of the evidence of the trust property, as, for example, title deeds.[21] The court said in the last cited case[22] that "no laches could be imputed to the trustees for suffering one of their number to hold the deeds. The reason is, that the deeds must be held by some one person, unless they are deposited with bankers, or placed in a box secured by a number of different locks, of which each trustee should hold one of the keys; and negligence cannot be imputed to trustees for not taking such precautions as these."

Yet in other English cases passively allowing a co-trustee to take exclusive possession has been regarded as a breach of trust, rendering the inactive trustee liable for loss of the funds while in the co-trustee's hands.[23] In *Rodbard* v. *Cooke*, the court said: [24]

[19] J. Bridgman, 37, 38.

[20] Spalding *v.* Shalmer, 1 Vern. 301 (1684); Anonymous, 12 Mod. 560 (1701); Aplyn *v.* Brewer, Finch's Prec. Ch. 173 (1701), *semble;* Fellows *v.* Mitchell, 1 P. Wms. 81 (1705); Leigh *v.* Barry, 3 Atk. 583 (1747), *semble; In re* Fryer, 3 Kay & J. 317 (1857).

[21] Cottam *v.* Eastern Counties Ry. Co., 1 Johns. & H. 243 (1860).

[22] *Ibid.*, 247.

[23] *Ex parte* Shakeshaft, 3 Bro. Ch. 197 (1791); Gregory *v.* Gregory, 2 Y. & C. 313 (1836); Lockhart *v.* Reilly, 25 L. J. Ch. 697 (1856); Rodbard *v.* Cooke, 36 L. T. N. S. 504 (1877); Lewis *v.* Nobbs, 8 Ch. D. 591 (1878).

[24] 36 L. T. N. S. 504, 505 (1877).

"It may be stated as a general rule of law, that where there are two trustees, and one of them places a fund so that it is under the sole control of the other, if the money is misapplied by that other, both are equally liable. The object of having two trustees is to double the control over the trust property, and when one trustee thinks fit to give the other the sole power of dealing with the trust property he defeats that object and becomes himself responsible."

The words of this quotation suggest active conduct resulting in exclusive control by the co-trustee, but the facts of the case seem to indicate mere passivity.

Rare circumstances may justify exclusive control by one trustee and thus obviate any dispute as to the inactive trustee's liability. Thus, where the trust property consists of shares in a company, the deed of creation of which prohibited ownership of shares by two or more jointly, obviously one trustee must hold the shares.[25] If exclusive possession is obtained without the actual or constructive knowledge of the passive trustee, naturally there is no liability on his part, because there is no acquiescence in the sole control by the active trustee;[26] and the same is true where exclusive control is obtained by fraud, as by altering a check.[27] Here there is lack of real consent.

In a number of American cases the doctrine of *Townley* v. *Sherborne* has been approved, passive acquiescence in exclusive possession by a co-trustee has not been regarded as negligence or a breach of trust, and the inactive trustee has been absolved from liability.[28] In support of the attitude of these American courts

[25] Consterdine *v.* Consterdine, 31 Beav. 330 (1862).

[26] Derbishire *v.* Home, 3 De G. M. & G. 80 (1853).

[27] Barnard *v.* Bagshaw, 3 De G. J. & S. 355 (1862).

[28] Colburn *v.* Grant, 181 U. S. 601 (1901); Taylor *v.* Roberts, 3 Ala. 83 (1841); Glenn *v.* McKim, 3 Gill (Md.) 366 (1845); Stowe *v.* Bowen, 99 Mass. 194 (1868); Hunter *v.* Hunter, 50 Mo. 445 (1872), *semble;* Dyer *v.* Riley, 51 N. J. Eq. 124, 26 Atl. 327 (1893); Kip *v.* Deniston, 4 Johns. (N. Y.) 23 (1809); Banks *v.* Wilkes, 3 Sandf. Ch. (N. Y.) 99 (1845); Ormiston *v.* Olcott, 84 N. Y. 339 (1881); Purdy *v.* Lynch, 145 N. Y. 462, 40 N. E. 232 (1895); Westerfield *v.* Rogers, 174 N. Y. 230, 66 N. E. 813 (1903); Worth *v.* M'Aden, 1 Dev. & Bat. Eq. (N. C.) 199 (1835); Ochiltree *v.* Wright, 1 Dev. & Bat. Eq. (N. C.) 336 (1836); State *v.* Guilford, 18 Oh. 500 (1849), reversing 15 Oh. 593 (1846); Stell's Appeal, 10 Pa. St. 149 (1848); Fesmire's Estate, 134 Pa. 67, 19 Atl. 502 (1890); Birely's Estate, 7 Pa. Dist. R. 395 (1898); Boyd's Ex'rs *v.* Boyd's Heirs, 3 Gratt. (Va.) 113 (1846); Griffin's Ex'r *v.* Macaulay's Adm'r, 7 Gratt. (Va.) 476, 578 (1851); Keenan *v.* Scott, 78 W. Va. 729, 90 S. E. 331 (1916). See also City Bank *v.* Maulson, 3 Chanc. Ch. R. (U. C.) 334 (1871). Due to the purely re-

Finch, J., said in *Ormiston* v. *Olcott*:[29] "There would be neither wisdom nor justice in a rule which would practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent." The question will later be raised whether this view does not lose sight of the fact that an inactive trustee may himself be a wrongdoer and that diligence on his part may well have prevented the error or fraud of his fellow. A smaller number of American courts have considered passively surrendering the trust property to the exclusive care of a co-trustee to be negligence and have held the inactive trustee liable.[30] Where the co-trustee was found in exclusive possession,[31] or was passively allowed to assume it,[32] and the inactive trustee thereafter did nothing to return the property to joint control, he has been held liable.

If the active trustee has obtained exclusive control of the property without the knowledge or consent of the inactive trustee, obviously there is no basis for a judgment against the latter.[33]

Entrusting the Co-Trustee with Exclusive Control by Positive Act

The English cases are almost unanimous in regarding as a negligent breach of trust a positive act by the passive trustee (as, for example, the execution of a power of attorney) by means of which the co-trustee is enabled to get exclusive control of trust assets and thereby to waste them.[34] But *Mendes* v.

medial nature of constructive trusts it would seem that such trustees should never be liable except for property actually received (Hunter *v.* Hunter, 50 Mo. 445 (1872)), unless several were jointly engaged in a fraud, in which case each might be said to receive the whole. Harrigan *v.* Gilchrist, 121 Wis. 127, 280, 99 N. W. 909 (1904).

[29] 84 N. Y. 339, 346 (1881).

[30] Royall's Adm'r *v.* McKenzie, 25 Ala. 363 (1854); Fox *v.* Tay, 89 Cal. 339, 24 Pac. 855 (1891), *semble;* Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11 (1826); Maccubbin *v.* Cromwell, 7 Gill & J. (Md.) 157 (1835); Laroe *v.* Douglass, 13 N. J. Eq. 308 (1861), *semble;* Mumford *v.* Murray, 6 Johns. Ch. (N. Y.) 1 (1822); Bowman *v.* Rainetaux, Hoff. Ch. (N. Y.) 150 (1839); Spencer *v.* Spencer, 11 Paige (N. Y.) 299 (1844); Earle *v.* Earle, 93 N. Y. 104 (1883).

[31] Thomas *v.* Scruggs, 10 Yerg. (Tenn.) 400 (1837).

[32] Harvey *v.* Schwettman, 180 S. W. (Mo.) 413 (1915).

[33] Lansburgh *v.* Parker, 41 App. D. C. 549 (1914).

[34] Bradwell *v.* Catchpole, 3 Swanst. 78, n (1818); Chambers *v.* Minchin, 7 Ves. 186 (1802); Hanbury *v.* Kirkland, 3 Simon, 265 (1829); Marriott *v.* Kinnersley, Tamlyn, 470 (1830); Wiglesworth *v.* Wiglesworth, 16 Beav. 269 (1852); Brumridge *v.* Brum-

Guedalla [35] seems to run counter to this weight of authority. In that case two trustees placed in the hands of a third the key to a bank box for the purpose of enabling him to get the coupons from trust securities. The bank was instructed to deliver to the active trustee the coupons only and not the box, but it negligently delivered the box to the active trustee and he defaulted. The court declined to hold the passive trustees liable, although it would seem that their act made possible the loss of the trust funds, because it put them in a position where the combined negligence of the bank and fraud of the co-trustee could cause their dissipation.

The American courts have not been harmonious in their treatment of the inactive trustee whose sole negligence, if such it be, has been the taking of a positive step for the purpose of entrusting his active co-trustee with exclusive possession of the trust property. In a number of instances the passive trustee, or guardian or other fiduciary treated by the court as a trustee, has been held responsible, upon the loss of the property by the negligence or crime of the active trustee.[36] But the opposite result has been reached in several cases,[37] the courts stating that, in the absence of warning that the active trustee is in financial difficulty or is dishonest, such conduct by the inactive trustee is not negligent. In *Purdy* v. *Lynch* [38] the purpose of the trust was the payment of

ridge, 27 Beav. 5 (1858); Cowell *v.* Gatcombe, 27 Beav. 568 (1859); Ingle *v.* Partridge, 32 Beav. 661 (1863); *Re* Taylor, 81 L. T. N. S. 812 (1900), *semble.*

[35] 2 Johns. & H. 259 (1862). See also Home *v.* Pringle, 8 Clark & F. 264 (1841), and Shepherd *v.* Harris, [1905] 2 Ch. 310.

[36] Wallis *v.* Thornton's Adm'r, 2 Brock. (U. S. C. C.) 422 (1831); Edmonds *v.* Crenshaw, 14 Pet. (U. S.) 166 (1840); Gray *v.* Reamer, 11 Bush. (Ky.) 113 (1874); Barroll *v.* Forman, 88 Md. 188, 40 Atl. 883 (1898); Smith *v.* Pettigrew, 34 N. J. Eq. 216 (1881); Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283 (1821); Bruen *v.* Gillet, 115 N. Y. 10, 21 N. E. 676 (1889); Matter of Litzenberger, 85 Hun (N. Y.) 512, 33 N. Y. Supp. 155 (1895); Graham *v.* Davidson, 2 Dev. & Bat. Eq. (N. C.) 155 (1838); Hauser *v.* Lehman, 2 Ired. Eq. (N. C.) 594 (1843); Clark's Appeal, 18 Pa. 175 (1851); Donnelly's Estate, 11 Pa. Dist. R. 211 (1902); Graham *v.* Austin, 2 Gratt. (Va.) 273 (1845). To the same effect is Mickleburgh *v.* Parker, 17 Grant Ch. (U. C.) 503 (1870).

[37] Laurel Co. Ct. *v.* Trustees, 93 Ky. 379, 20 S. W. 258 (1892); Adair *v.* Brimmer, 74 N. Y. 539 (1878); Purdy *v.* Lynch, 145 N. Y. 462, 40 N. E. 232 (1895); State *v.* Guilford, 18 Oh. 500 (1849), reversing 15 Oh. 593 (1846); Jones' Appeal, 8 W. & S. (Pa.) 143 (1844); Appeal of Hatch, 12 Atl. (Pa.) 593 (1888). In *Re* McLatchie, 30 Ont. R. 179 (1898), it was held that where the affirmative action of the passive trustee would put the co-trustee in sole control only if the co-trustee committed a crime (forgery), there was no negligence by the passive trustee.

[38] 145 N. Y. 462, 473, 40 N. E. 232 (1895).

the debts of a bank. One trustee, who was also a receiver of the bank and had a good reputation, was entrusted by the other trustees with exclusive possession of the trust property for the purpose of paying off the bank's debts to its depositors. This was approved by the court as reasonable conduct and liability for the loss of the funds by the active trustee was not fastened upon the inactive trustees.

The act of entrusting the *res* to a co-trustee may obviously be negligent, if the passive trustee has knowledge, prior to his surrender of possession, that the co-trustee is financially embarrassed.[39]

Failure to Supervise the Conduct of the Active Co-Trustee

In many instances the evidence shows, not only exclusive possession by the active trustee, obtained through the acquiescence or affirmative aid of the inactive trustee, but also the lapse of a considerable period of time after such entrusting, with no investigation by the inactive trustee of the conduct of the active trustee. This situation raises the question whether failure to supervise the work of a co-trustee, as, for example, failure to examine the investments made by him, or to inspect his accounts, is such negligence as makes the inactive trustee liable for the damage to the trust estate.

The English cases have been unanimous in asserting a duty to watch an active co-trustee in exclusive control, to examine his books and inspect the property in his hands from time to time. To fail to give such supervision has been held negligence rendering the passive trustee accountable, whether the active trustee acquired exclusive control through the mere passivity of the inactive trustee [40] or through his positive action.[41]

[39] Estate of Evans, 2 Ashm. (Pa.) 470 (1841).

[40] Lincoln *v.* Wright, 4 Beav. 427 (1841); Thompson *v.* Finch, 22 Beav. 316 (1856); Wynne *v.* Tempest, 13 T. L. R. 360 (1897). In the last-named case the trustee was held not to be protected by the provision of section 3 of the Judicial Trustees Act of 1896 to the effect that a court might relieve from liability for a breach of trust a trustee who had acted "honestly and reasonably."

[41] Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16 (1841); Wiglesworth *v.* Wiglesworth, 16 Beav. 269 (1852); Trutch *v.* Lamprell, 20 Beav. 116 (1855); Mendes *v.* Guedalla, 2 Johns. & H. 259 (1862); Hale *v.* Adams, 21 W. R. 400 (1873); *In re* Second East Dulwich Soc., 68 L. J. Ch. (N. S.) 196 (1899). In Horton *v.* Brocklehurst, 29 Beav. 504 (1858), there was the additional fact that the passive trustee had represented to

The American decisions also very generally place upon the inactive trustee the duty of supervising and inspecting the work of the active trustee. A trustee who has by failure to act or by direct action enabled his co-trustee to obtain exclusive control of the trust subject-matter must examine the investments and accounts of the active trustee.[42] Thus, in *Richards* v. *Seal*[43] an inactive trustee who for eleven years made no examination of the status of a bond entrusted to a co-trustee, and thus failed to learn that the co-trustee had collected it and held the proceeds uninvested, was charged with a loss resulting from the inability of the co-trustee to turn over the money.[44] This duty to supervise exists whether the nonparticipating trustee at the time when he becomes a trustee finds the co-trustee in control,[45] or has passively allowed the co-trustee to take exclusive charge,[46] or has by his own positive act put the companion trustee into possession.[47]

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the *cestui que trust* that the funds had been properly invested by the active co-trustee, although he (the inactive trustee) knew nothing about the investments. Liability was fixed upon the inactive trustee.

[42] Adams' Estate, 221 Pa. 77, 84, 70 Atl. 436 (1908). But see Kerr *v.* Kirkpatrick, 8 Ired. Eq. (N. C.) 137 (1851), where it is denied that "one trustee is bound to keep a supervision over the acts of another."

[43] 2 Del. Ch. 266 (1861).

[44] To the same effect see Estate of Hilles, 13 Phila. 402 (1880). Jones's Appeal, 8 W. & S. (Pa.) 143 (1844), held that mere inquiry of a co-guardian was sufficient performance of the duty to investigate, Gibson, J., saying (p. 151): "To require him to have dealt with his colleague as a rogue, by calling for the securities, would require of him the highest and most exact vigilance; a degree of it that would ruin every guardian." This seems a questionable rule as applied to trustees.

[45] Ralston *v.* Easter, 43 App. D. C. 513 (1915).

[46] In the following cases the loss arose from the bad management or improper investments of the active trustee: Ashley *v.* Winkley, 209 Mass. 509, 95 N. E. 932 (1911); Klatt *v.* Keuthan, 185 Mo. App. 306, 170 S. W. 374 (1914); Wilmerding *v.* McKesson, 103 N. Y. 329, 8 N. E. 665 (1886). In other cases the defalcation of the active trustee was the immediate cause of the loss: Bates *v.* Underhill, 3 Redf. Surr. (N. Y.) 365 (1878); City Bank *v.* Maulson, 3 Chanc. Ch. R. (U. C.) 334 (1871); Crowe *v.* Craig, 29 Nov. Sc. 394 (1897). In Wilmerding *v.* McKesson, 103 N. Y. 329, 8 N. E. 665 (1886), however, the court refused to hold the passive trustee liable for the conversion of the trust property by the active trustee, saying that there was no duty to guard against such conduct, unless there was reason to suspect the co-trustee, that is, some fact to put the inactive trustee upon his guard. And in Matter of Halstead, 110 App. Div. 909, 95 N. Y. Supp. 1131 (1905), affirmed without opinion, 184 N. Y. 563, 76 N. E. 1096 (1906), a trustee who for five years allowed trust securities to remain in a bank box to which both trustees had keys, without examining the securities, was held not liable when his active co-trustee stole the securities, since the passive trustee had no reason to suspect the co-trustee.

[47] Caldwell *v.* Graham, 115 Md. 122, 80 Atl. 839 (1911); Thompson *v.* Hicks, 1 App.

If the trust settlement directs that the funds be invested in a particular way, as, for example, in mortgages upon real estate, the duty of the inactive trustee to supervise the conduct of the active colleague would seem to be accentuated, if anything. For failure to make such inspection, resulting in the continuance of an improper investment or in no investment at all, the passive member of the trusteeship has been charged.[48] The opinion of a Tennessee court is forcefully put in *Deaderick* v. *Cantrell* by Turley, J., as follows:[49]

"Two trustees are appointed to execute a trust, the final operation of which is not to be completed for years, they undertake to execute it, they are intended as checks on each other, have an equal control over the fund, are mutually bound to attend to the interest of the trust, and shall one of them be permitted to go to sleep and trust everything to the management of his co-trustee, and when in the course of ten or fifteen years, the fund having been wasted, and his co-trustee insolvent, he is called upon to make it good, shall he be heard to say that he had implicit confidence in his companion, and permitted him to retain all the money, and appropriate it as he pleased, and that he ought not therefore to be charged? Surely not, it is neither law nor reason."

If the settlor directs no specific investments, the law implies a duty to invest in the securities allowed by chancery. In both cases the trust is in a sense "directory" and the duty to inspect and supervise investments ought to be the same in both cases.

Warning of Danger to Trust Fund, Followed by Continued Inactivity

Let us next suppose that the active trustee has got exclusive possession of the trust property, either by the act of the passive

Div. 275, 37 N. Y. Supp. 340 (1896); Fesmire's Estate, 134 Pa. 67, 19 Atl. 502 (1890); McMurray *v.* Montgomery, 2 Swan (Tenn.), 374 (1852). *Contra*, *In re* Cozzens' Estate, 15 N. Y. Supp. 771 (1891). In Caldwell *v.* Graham the court said (p. 129): "In accepting the appointment the trustees assumed the joint and equal obligation of exercising their discretion and control with respect to the trust in its entirety."

[48] Beatty's Estate, 214 Pa. 449, 63 Atl. 975 (1906); Deaderick *v.* Cantrell, 10 Yerg. (Tenn.) 263 (1837). But in Cocks *v.* Haviland, 124 N. Y. 426, 26 N. E. 976 (1891), a passive trustee was not held liable, notwithstanding a direction to invest in bonds and mortgages and knowledge by the inactive trustee that the direction had not been obeyed by his co-trustee.

[49] 10 Yerg. (Tenn.) 263, 272 (1837).

trustee or without his objection, and that the inactive trustee thereafter learns of a step taken or about to be taken by the active trustee which is or will be dangerous to the interests of the beneficiary. In such circumstances there can be no doubt of the passive trustee's duty to move to protect the *cestui que trust*, and if he fails to bestir himself, he will be liable for injury to the trust estate subsequently resulting from the fault of the active trustee.[50] Robertson, L. P., in *Millar's Trustees* v. *Polson* has graphically described the position of the inactive trustee in this case: [51]

"It is, of course, disagreeable to take a co-trustee by the throat, but if a man undertakes to act as a trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs in letting things slide and losing money rather than create ill feeling."

The American courts have been equally clear that idleness after a warning of danger is a negligent breach of trust. "It is the duty of one trustee to protect the trust estate from any misfeasance by his co-trustee, upon being made aware of the intended act, by obtaining an injunction against him; and if the wrongful act has been already committed, to take measures, by suit or otherwise, to compel the restitution of the property, and its application in the manner required by the trust." [52] This rule has been applied where the knowledge was of an improper investment,[53] a refusal to return the property to joint control,[54] the insolvency of the active trustee,[55] an interest of the active trustee antagonistic to that of

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[50] Boardman *v.* Mosman, 1 Bro. Ch. 68 (1779); Brice *v.* Stokes, 11 Ves. 319 (1805); Booth *v.* Booth, 1 Beav. 125 (1838); Curtis *v.* Mason, 12 L. J. Ch. (N. S.) 442 (1843); Millar's Trustees *v.* Polson, 34 Sc. L. R. 798 (1897).

[51] *Ibid.*, 804.

[52] Crane *v.* Hearn, 26 N. J. Eq. 378, 381 (1875); see also Elmendorf *v.* Lansing, 4 Johns. Ch. (N. Y.) 562 (1820).

[53] Bermingham *v.* Wilcox, 120 Cal. 467, 52 Pac. 822 (1898); Matter of Niles, 113 N. Y. 547, 21 N. E. 687 (1889); *In re* Cozzens' Estate, 15 N. Y. Supp. 771 (1891); Meldon *v.* Devlin, 31 App. Div. 146, 53 N. Y. Supp. 172 (1898), aff'd without opinion, 167 N. Y. 573, 60 N. E. 1116; Pim *v.* Downing, 11 S. & R. (Pa.) 66 (1824).

[54] Ralston *v.* Easter, 43 App. D. C. 513 (1915). *Contra*, Stewart's Estate, 21 Pa. Dist. R. 635 (1912).

[55] Darnaby *v.* Watts, 21 S. W. (Ky.) 333 (1893).

the *cestui que trust*,[56] or any breach of trust.[57] A recent case of this type is *Adams' Estate*,[58] where a trustee had knowledge that a co-trustee had wrongfully assumed exclusive control of the trust securities, but, after restoring the property to a bank box rented in the names of both, the inactive trustee failed to instruct the bank to open the box only on the application of both trustees and thus allowed the co-trustee the means of getting exclusive possession again. Such failure to guard the estate was held negligence, rendering the inactive trustee liable.

Statutory Rules

An English statute of 1859 [59] lays down important rules regarding the liabilities of trustees. It provides that every trust instrument shall be deemed to contain a clause to the effect that the several trustees shall be chargeable only for such property "as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity,[60] and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, . . ." This act has been copied in Canada, Australia and New Zealand,[61] and was incorporated into the English Trustee Act of 1893.[62] A statute applicable to Scotch trustees enacted in 1861 provides that each trustee "shall only be liable for his acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions." [63]

[56] Hill *v.* Hill, 79 N. J. Eq. 521, 82 Atl. 338 (1912).

[57] Matter of Howard, 110 App. Div. 61, 97 N. Y. Supp. 23 (1905), aff'd without op., 185 N. Y. 539, 77 N. E. 1189 (1906).

[58] 221 Pa. 77, 70 Atl. 436 (1908).

[59] 22 & 23 Vict., ch. 35, § 31.

[60] Some courts in earlier cases made the distinction that trustees acting "for conformity only," that is, merely formally, were not liable for the property received by their co-trustees. Gray *v.* Reamer, 11 Bush (Ky.) 113 (1874); and the same doctrine has been applied to executors. Terrell *v.* Matthews, 11 L. J. Ch. (N. S.) 31 (1841).

[61] Brit. Col. Tr. Act, § 88; New Bruns. Tr. Act, § 17; Cons. Stat. Newf. (1892), chap. 84, § 14; Nov. Sc. Tr. Act, § 24; Ont. Tr. Act, § 35; Sask. Tr. Act, § 9; New So. Wales Tr. Act (1898), § 69; Queensl. Tr. & Ex. Act (1897), § 25; Vict. St. Trusts (1864), § 78; New Zeal. Tr. Act, § 82.

[62] 56 & 57 Vict., chap. 53, § 24.

[63] 24 & 25 Vict., chap. 84, § 1.

The English statute of 1859 would logically seem to require proof of two facts before liability could be fixed upon any trustee, namely, (a) that the trust property lost was at some time in the hands of the defendant trustee, that is, that he had actually received it; and (b) in addition that the loss was occasioned by an act or failure to act on the part of the defendant trustee. If the property in question has always been in the exclusive possession of the defendant's co-trustee, the defendant would seem not to be liable, even though he may have caused or consented to such exclusive possession or failed to have the property restored to joint possession after an opportunity so to do. In other words this statute would seem to bar liability by a trustee in case number one of the analysis above, namely, the case of merely passively allowing the co-trustee exclusive possession. It would seem to sanction this conduct by a trustee and to indicate that it is proper for one trustee to stand by while his co-trustee takes possession of the trust property, and that, after such taking, the inactive trustee is under no duty to supervise the acts of the co-trustee with respect to this property or to require joint control, even if he knows of specific danger to the trust estate. This construction would make the trust severable, would provide that as to the property over which one trustee assumes complete control he is in the same position as a sole trustee and that he and he alone is liable for the safety of that trust property.

Cases two, three and four of the analysis, those of affirmative action to give the co-trustee exclusive control, lack of supervision of exclusive control, and failure to protect the trust property after a warning of danger, would seem under the statute of 1859 still to furnish cases where the inactive trustee may be liable, if he has himself had possession of the trust property at any time. If he has received the trust property at some time and turned it over to his active co-trustee, a later failure to act on the part of the inactive trustee may be a "neglect" under the statute, for which he should be liable, notwithstanding the exclusive possession by his co-trustee.

When one turns from a consideration of the apparent meaning of the statute of 1859 to the actual decisions in England since that date, one finds no mention of the statute, but a number of cases in which an inactive trustee, who had at one time had possession of the property, has been held accountable for neglect which con-

tributed to the loss.[64] As suggested above, this seems logical under the statute. There are also a few cases in which an inactive trustee is held responsible for property which he never actually received, on the basis of neglect after the receipt of it by his co-trustee.[65] These cases are difficult to reconcile with the express provision of the statute that a trustee shall be liable only for what he actually receives, unless it be on a theory suggested later in another connection, namely, that the courts are hostile to such clauses and construe them to mean that an opportunity and duty to get possession are equivalent to actual possession.

Another English statute bearing on the liability of trustees is that section of the Judicial Trustees Act of 1896 [66] which gives the court power to excuse a trustee from liability for a breach of trust, if he acted "honestly and reasonably." But this statute has been held not to be intended to protect the inactive trustee who delegates the trust duties and fails to supervise the administration of the trust. Such conduct is not "reasonable" or "honest." [67] Hence this section of the Judicial Trustees Act has only a limited bearing on the questions here discussed.

A few American states have codified the law regarding the liability of an inactive trustee in the following form: [68] "A trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enabled the latter to commit, but for no others." It is not believed that these statutes alter the pre-existing rules of equity.

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[64] Hale *v.* Adams, 21 W. R. 400 (1873); Lewis *v.* Nobbs, 8 Ch. D. 591 (1878); Rodbard *v.* Cooke, 36 L. T. N. S. 504 (1877); Bacon *v.* Camphausen, 58 L. T. N. S. 851 (1888); Robinson *v.* Harkin, [1896] 2 Ch. 415; *Re* Taylor, 81 L. T. N. S. 812 (1900), *semble.*

[65] Bahin *v.* Hughes, 31 Ch. D. 390 (1886); Wynne *v.* Tempest, 13 L. T. R. 360 (1897); *In re* Second East Dulwich Soc., 68 L. J. Ch. (N. S.) 196 (1899).

[66] 59 & 60 VICT., chap. 35, § 3 (1896). This act has been copied in the dominions. BRIT. COL. TR. ACT, § 89; NEW BR. TR. ACT, § 49; ONT. TR. ACT, § 37; NEW SO. WALES TR. AMEND. ACT (1902), § 9; QUEENSL. TR. & EX. ACT (1897), § 51; NEW ZEAL. TR. ACT, § 89.

[67] *In re* Turner, [1897] 1 Ch. 536. See also *In re* Second East Dulwich Soc., 68 L. J. Ch. (N. S.) 196 (1899), in which Kekewich, J., said (p. 198): "It seems to me that a man who accepts such a trusteeship, and does nothing, swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanations, is dishonest." But see Dover *v.* Denne, 3 Ont. L. R. 664 (1902).

[68] CAL. CIV. CODE, § 2239; MONT. CIV. CODE, § 5385; N. D. CIV. CODE, § 6292; S. D. REV. CODE (1919), § 1206.

CONTROL OF INACTIVE TRUSTEE'S LIABILITY BY PARTIES

A settlor may provide that each of two trustees shall be liable for a moiety of the trust property only,[69] or that four trustees shall take turns in administering the trust for a year each and that each shall be liable only during the period of his active administration.[70] English courts have not been friendly to clauses in trust instruments excusing trustees from liability except for property actually received by them, and have construed such clauses to mean that the trustee is liable for what he ought to have received, as well as for what he actually did have in his hands.[71] In *Brumridge* v. *Brumridge*, Romilly, M. R., said: [72]

"This clause is constantly brought forward to sanction the misappropriation of trust moneys; but until it is provided, by the instrument creating the trust, that the trustee shall be liable for no breach of trust, provided he does not obtain a personal advantage, I shall not consider the clause as giving a trustee the right or liberty of conniving at a breach of trust. Even if an instrument containing such an inconsistent clause were brought before me, I express no opinion on the result; but until it is, I cannot allow a trustee to say, that it is not his business to act properly in the performance of his duty as a trustee."

A provision in the trust deed or will that each trustee shall be liable only for his own default does not protect an inactive trustee from liability for allowing a co-trustee to have exclusive possession. Such negligence is a default as much as a positive breach of trust would be.[73] These constructions of the clauses in English trust instruments before 1859 are consistent with the decisions previously referred to as occurring since the Act of 1859. Both sets of decisions recognize negligence as a default and both treat a duty to get actual possession as equivalent to actual possession.

Upon examining the American cases we find that in *Walker* v.

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[69] Birls *v.* Betty, 6 Madd. 90 (1821). And so, too, clauses making each executor liable only for his own acts (Westley *v.* Clarke, 1 Eden, 357 (1759)), or excusing a trustee from the duty of watching his co-trustee (Wilkins *v.* Hogg, 3 Giff. 116 (1861); Pass *v.* Dundas, 29 W. R. 332 (1881)), have been held valid.

[70] Att'y Gen. *v.* Holland, 2 Y. & C. 683 (1837).

[71] Mucklow *v.* Fuller, Jacobs 198 (1821); Bone *v.* Cook, McCl. 168 (1824); Brumridge *v.* Brumridge, 27 Beav. 5 (1858).

[72] *Ibid.*, 7.

[73] Marriott *v.* Kinnersley, Tamlyn, 470 (1830); Dix *v.* Burford, 19 Beav. 409 (1854).

Walker's Ex'rs [74] the settlor's direction that one trustee should have exclusive possession of the trust property was held to excuse the inactive trustees from liability for the loss of such property.[75] But in *Graham* v. *Austin* [76] an attempt by the settlor to restrict the responsibility of a trustee to a moiety of the property was not allowed to have effect. No matter what may be the settlor's power to limit liability by insertions in the trust instrument, it is obvious that oral statements of a testator-settlor to a prospective trustee, not incorporated into the will, can have no effect to restrict the trustee's liability.[77]

The hostility of the courts to a settlor's direction that a trustee's liability shall be limited to the property he actually receives was further shown in *Caldwell* v. *Graham*,[78] where such a clause was somewhat remarkably construed to provide merely against liability for the depreciation of the property while in the trustee's hands. A clause restricting the trustee's responsibility to cases of "wilful default" was sustained in *Crabb* v. *Young*,[79] Ruger, Ch. J., stating: [80] "The testator had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done. . . . the court has not the right to increase the measure of their responsibility or impose obligations from the burden of which he has in his will so carefully protected them." But in *Litchfield* v. *White* [81] an assignment for the benefit of creditors, containing a provision that the trustee should be liable only for gross negligence and wilful default, was held void. A clause excusing the trustees from all liability for losses occurring without "wilful default" was held in *Matter of Howard* [82] not to exempt from liability a trustee who,

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[74] 88 Ky. 615, 11 S. W. 718 (1889).

[75] The decisions in Duckworth *v.* Ocean Steamship Co., 98 Ga. 193, 26 S. E. 736 (1896), and Markel *v.* Peck, 168 Mo. App. 358, 151 S. W. 772 (1912), allowing the settlor to alter the usual *powers* of the trustee, would seem to support the principle that the settlor may also change the several liabilities of the trustees.

[76] 2 Gratt. (Va.) 273 (1845).

[77] Dover *v.* Denne, 3 Ont. L. R. 664 (1902).

[78] 115 Md. 122, 80 Atl. 839 (1911).

[79] 92 N. Y. 56 (1883).

[80] *Ibid.*, 65–66.

[81] 3 Selden (N. Y.) 438 (1852).

[82] 110 App. Div. 61, 97 N. Y. Supp. 23 (1905), aff'd without op., 185 N. Y. 539, 77 N. E. 1189 (1906).

after knowledge of a breach of trust by his co-trustee, passively allowed the co-trustee to take exclusive possession of the property.

The settlor's power over the details of trust administration has frequently been sustained; as, for example, in giving to trustees greater latitude than usual in the selection of investments. It would seem that this power should extend to such limitations of the trustees' liability as are not repugnant to the essential ideas of a trust and do not attempt to make crime lawful.

Trustees have no power by agreement among themselves to divide their responsibilities and to limit the liability of any particular trustee to a portion of the trust property.[83] Thus, in *Caldwell* v. *Graham*,[84] where trustees divided the trust property among themselves, one taking the realty and the other the personalty, the court declined to excuse one trustee for negligence respecting the property allotted to the other trustee and said:[85] "It was optional with him to accept or decline the trust, but, having undertaken the duty imposed by the will, it was not competent for him to limit his obligation or divest himself of any part of his fiduciary discretion." This view seems unquestionably correct, since the function of a trustee is to administer the trust and not to alter its terms.

The consent of the *cestui que trust* to division of responsibility among trustees has been held not to render such division proper.[86] This result is readily understandable where the consenting beneficiary possesses only a temporary interest and attempts to affect the rights of a remainderman *cestui que trust*.[87] But it would seem patent that any *cestui que trust* of full age and sound mind may estop himself from asserting liability against any particular trustee, either wholly or partially.

A contract by trustees in the trust instrument that each shall be liable for the acts of the other is unobjectionable and valid.[88]

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[83] Fellows *v.* Mitchell, 1 P. Wms. 81 (1705); Lewis *v.* Nobbs, 8 Ch. D. 591 (1878); Mickleburgh *v.* Parker, 17 Grant's Ch. (U. C.) 503 (1870); Bermingham *v.* Wilcox, 120 Cal. 467, 52 Pac. 822 (1898); Stong's Estate, 160 Pa. 13, 28 Atl. 480 (1894); Thomas *v.* Scruggs, 10 Yerg. (Tenn.) 400 (1837). *Contra, In re* Cozzens' Estate, 15 N. Y. Supp. 771 (1891); Jones's Appeal, 8 W. & S. (Pa.) 143 (1844) (case of joint guardians treated as trustees).

[84] 115 Md. 122, 80 Atl. 839 (1911).

[85] *Ibid.*, 127.

[86] Fellows *v.* Mitchell, 1 P. Wms. 81 (1705).

[87] Mickleburgh *v.* Parker, 17 Grant's Ch. (U. C.) 503 (1870).

[88] Leigh *v.* Barry, 3 Atk. 583 (1747).

The power of equity to make one trustee liable primarily and another secondarily would seem beyond doubt,[89] but the action of a Federal court,[90] in approving the decree of a probate court which divided the trust property between trustees and in limiting the liability of each trustee to his share of the property, seems to amount to violating the settlor's intent and remaking the trust for him.

Discussion on Principle

The liabilities of an inactive trustee should be determined by the application of the broad general principles of equity (*a*) that trustees are joint tenants; [91] (*b*) that the trust powers in private trusts are jointly held and must be exercised by unanimous action, in the absence of express provision to the contrary; [92] (*c*) that the trustee is required to use the care which an ordinarily prudent man would use in the conduct of his own affairs; [93] and (*d*) that the trustee may not delegate the exercise of discretionary powers,[94] but may leave to agents the performance of ministerial duties or mere mechanical acts.[95] These rules are well settled and fundamental. They should govern the inactive member of a co-trusteeship, as well as all other trustees.

When tested by these standards the problem raised by case four, that of the trustee who remains inactive after notice of a past specific breach of trust or a threatened breach by his co-trustee, seems simple. To fail to act to repair a past wrong or prevent a

[89] McCartin *v.* Traphagen, 43 N. J. Eq. 323, 11 Atl. 156 (1887). Space will not permit a discussion of the questions whether a trustee who has been held liable for a breach of trust ever has a right to contribution or to indemnity from his co-trustees. The former problem is treated in Fletcher *v.* Green, 33 Beav. 426 (1864), and the latter in Lockhart *v.* Reilly, 25 L. J. Ch. 697 (1856); Price *v.* Price, 42 L. T. R. 626 (1880); Bahin *v.* Hughes, 31 Ch. D. 390 (1886); Bacon *v.* Camphausen, 58 L. T. N. S. 851 (1888); *In re* Turner, [1897] 1 Ch. 536; Head *v.* Gould, [1898] 2 Ch. 250; and *In re* Linsley, [1904] 2 Ch. 785.

[90] American Bonding Co. *v.* Richardson, 214 Fed. 897 (1914).

[91] Perry, Trusts, 6 ed., § 343.

[92] Sinclair *v.* Jackson, 8 Cowen (N. Y.), 543 (1826); Cornett *v.* West, 102 Wash. 254, 173 Pac. 44 (1918). In Fritz *v.* City Tr. Co., 72 App. Div. 532, 533, 76 N. Y. Supp. 625 (1902) (aff'd, 173 N. Y. 622), 66 N. E. 1109 (1903), Woodward, J., stated that "trustees, however numerous, constitute in law but a single person."

[93] Rae *v.* Meek, 14 App. Cas. 558, 569 (1889).

[94] *Re* Partington, 57 L. T. R. 654 (1888); Robinson *v.* Harkin, [1896] 2 Ch. 415; *In re* Turner, [1897] 1 Ch. 536; Colburn *v.* Grant, 181 U. S. 601, 606 (1901).

[95] 39 Cyc. 304.

threatened injury is to fail to use the care of a reasonably prudent man. No person of ordinary judgment would remain idle when he heard that an agent to whom he had entrusted bonds had stolen a portion of them, or was making preparations to decamp to South America. Trustees have been held to be under a duty to act against *third persons* to remedy a past injury [96] or ward off impending danger to the estate,[97] as, for example, where trespassers have cut or threaten to cut timber from trust land. That the actual or prospective wrongdoer is a co-trustee does not diminish the duty of a trustee to act to repair or avoid injury.

And so, too, case three, that of the passive trustee who fails to inspect or supervise the administration of the trust by his active colleague, seems easy of solution. In the first place, to allow the co-trustee exclusive control of investments, the keeping of accounts, and expenditures from trust funds, is a delegation of discretionary duties. If the inactive trustee supervises the acts of his co-trustee, he becomes active and he may be said to make the acts of the co-trustee his own acts, to use his own discretion in the administration of the trust. But where there is no inspection, and the inactive trustee knows that discretionary duties must be performed, he is assuredly authorizing the active co-trustee to exercise such discretion and ought to be regarded as committing a breach of trust. Secondly, judged by the measure of care of the ordinarily prudent man, the inactive trustee is guilty of a fault in failing to supervise. No man of common business ability would entrust a stock of goods, for example, to an agent for months or years without an accounting or inspection, even if there were no breath of suspicion against the agent.

Cases one and two, where there has been mere passivity, as a result of which the co-trustee has obtained exclusive possession, or where the affirmative act of the inactive trustee has caused such exclusive possession, seem identical in principle. The result is the same in both cases. Nonfeasance where there is a duty to act ought to be regarded as the equivalent of misfeasance. A trustee who accepts a trust impliedly promises to assume his full share of

[96] Davis *v.* Charles River Br. R. Co., 11 Cush. (Mass.) 506 (1853); State *v.* Mayor, 32 N. J. L. 49 (1866).

[97] Roman *v.* Long Dist. Tel. & Tel. Co., 147 Ala. 389, 41 So. 292 (1906); PERRY, TRUSTS, 6 ed., § 328.

control and responsibility. Since the trust title and the trust powers are joint, it is the duty of each trustee to aid in reducing the property to joint possession where it may be jointly controlled.[98]

It is believed that some courts have been misled by the rules applied to executors and administrators. These latter fiduciaries have separate powers. Any one of them may act alone. It is lawful for one executor to collect and disburse the assets of the testator, without the joinder of the other executors. Passivity, therefore, by an executor or administrator is not a breach of duty, and hence numerous cases have held that an executor who passively allows his co-executor exclusive possession is not liable for the wasting of the estate by his co-executor.[99] But once an executor or administrator has received possession of assets of the estate, he is under a duty to administer them himself, and if he thereafter delivers them to a co-executor or co-administrator, he is deemed to remain liable for their proper administration and to be responsible for the wasting of them by his co-fiduciary.[100] In the fields of executorship and administratorship there has been

[98] Dix *v.* Burford, 19 Beav. 409 (1854); Stong's Estate, 160 Pa. 13, 28 Atl. 480 (1894).

[99] Dix *v.* Burford, 19 Beav. 409 (1854); Peter *v.* Beverly, 10 Pet. (U. S.) 532, 562 (1836); Fleming *v.* Walker, 152 Ala. 386, 44 So. 536 (1907); Hall *v.* Carter, 8 Ga. 388 (1850); Ray *v.* Doughty, 4 Blackf. (Ind.) 115 (1835); Moore's Adm'r *v.* Tandy, 3 Bibb (Ky.), 97 (1813); Cheever *v.* Ellis, 144 Mich. 477, 108 N. W. 390 (1906); Fennimore *v.* Fennimore, 3 N. J. Eq. 292 (1835); Douglass *v.* Satterlee, 11 Johns. (N. Y.) 16 (1814); Cocks *v.* Haviland, 124 N. Y. 426 (1891); Williams *v.* Maitland, 1 Ired. Eq. (N. C.) 92 (1840); Irwin's Appeal, 35 Pa. 294 (1860); Atcheson *v.* Robertson, 3 Rich. Eq. (S. C.) 132 (1850). But a joint account filed by executors may make each liable for the whole property. Suydam *v.* Bastedo, 40 N. J. Eq. 433, 2 Atl. 808 (1885); Ducommun's Appeal, 17 Pa. 268 (1851). And the execution of a joint bond may also fasten liability for the whole estate upon each. Hughlett *v.* Hughlett, 5 Humph. (Tenn.) 453 (1844); *contra*, Nanz *v.* Oakley, 120 N. Y. 84, 24 N. E. 306 (1890).

[100] Langford *v.* Gascoyne, 11 Ves. 333, 335 (1805); Knight *v.* Haynie, 74 Ala. 542 (1883); Clark *v.* Clark, 8 Paige (N. Y.) 152 (1840); Croft *v.* Williams, 88 N. Y. 384 (1882); Mathews *v.* Mathews' Ex'x, 1 McMull. Eq. (S. C.) 410 (1841); *contra*, McKim *v.* Aulbach, 130 Mass. 481 (1881); Paulding *v.* Sharkey, 88 N. Y. 432 (1882). Some courts have treated the affirmative conduct giving the co-executor full control as innocent if "reasonable" (Hunt *v.* State Bk., 2 Dev. Eq. (N. C.) 60 (1831)), or "necessary" (*In re* Gascoigne, [1894] 1 Ch. 470), or done for an "exceptional reason" (*In re* Osborn, 87 Cal. 1, 25 Pac. 157 (1890)). In one early case it was held that an executor was not liable to *legatees* for paying money over to a co-executor who thereafter became insolvent, but would have been responsible to *creditors*. Appeal of Brown, 1 Dall. (U. S.) 311 (1788).

and is, therefore, room for a distinction between passively allowing another exclusive control and affirmative action to give such other sole control. Unfortunately many courts have confused executors and administrators on the one hand with trustees on the other.[101] The former are trustees only in the loose, non-technical sense that they are fiduciaries. The result of this confusion has been the application of the same rules regarding inactivity to both relationships and a tendency to differentiate passive entrusting from active entrusting in the case of co-trusteeships as well as co-executorships.

Assuming that cases one and two, that is, those of passive and active entrusting, are the same in legal effect, should the conduct of the inactive trustee in these two cases be regarded as a breach of trust? In view of the joint nature of the trust powers and title, is exclusive possession by one trustee an impropriety? Trustee A lives in New York and trustee B in Boston; the trust subject-matter consists of negotiable bonds. Must these securities be kept in a safety-deposit box to which access can be obtained only by the joint action of both trustees? Or is it sufficient if the bonds are placed in a box to which both have the separate power of access? Would it be lawful for B in Boston to agree with A in New York that the securities be placed in a bank box in New York, to be rented in the name of A and to which A was to have the only key? Going a step further, may B in Boston turn over the securities to A to be kept exclusively under A's control at such place as A may select? Should the rules regarding exclusive possession be the same, no matter what the character of the trust property, whether negotiable or non-negotiable, real or personal? Should the facility with which negotiable property, as, for example, money, notes and bonds, can be transferred in such a way as to defeat the interest of the *cestui que trust* therein, place on co-trustees a strict obligation to retain joint possession and control of such property;

[101] Edmonds *v.* Crenshaw, 14 Pet. (U. S.) 166 (1840); Stewart *v.* Conner, 9 Ala. 803 (1846); Hinson *v.* Williamson, 74 Ala. 180 (1883); Ormiston *v.* Olcott, 84 N. Y. 339, 346 (1881); Bruen *v.* Gillet, 115 N. Y. 10, 14, 21 N. E. 676 (1889); Matter of Provost, 87 App. Div. 86, 84 N. Y. Supp. 29 (1903). Guardianship has also been treated as equivalent to, or a form of, trusteeship. Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283 (1821); Kirby *v.* Turner, 1 Hopk. Ch. (N. Y.) 309 (1825); Graham *v.* Davidson, 2 Dev. & Batt. Eq. (N. C.) 155 (1838); Pim *v.* Downing, 11 S. & R. (Pa.) 66 (1824); Jones's Appeal, 8 W. & S. (Pa.) 143 (1844); Clark's Appeal, 18 Pa. 175 (1851).

whereas on the other hand joint trustees of land might properly allow one trustee to have exclusive possession because of the impossibility of the conveyance of the land except by joint action?

At the outset the practical difficulty of strict joint possession and control is evident. Trustees frequently live at a distance from each other. If they are required to keep trust securities in a box capable of being opened only by the joint action of all, then great inconvenience will result every time ministerial duties are to be performed, as, for example, the clipping and depositing of bond coupons. Trust administration will become very burdensome and few will consent to accept a co-trusteeship.[102]

Testing the conduct of the inactive trustee by the rules previously stated, one may ask whether there is any delegation of discretionary duties in allowing a co-trustee exclusive possession. The selection of the place where trust property shall be kept and the choice of the means of safeguarding if from loss by theft, fire, etc., undoubtedly involve discretion. To determine whether bonds shall be placed in a safety-deposit box in a bank or kept in the drawer of a secretary in a private house is not merely a ministerial or mechanical act. It would seem that an inactive trustee who consents to exclusive possession by his fellow without himself having a part in determining the particulars of possession, at what place and in what manner the active associate is to keep the trust property, is violating the trust and delegating a discretionary function. But if the inactive trustee stipulates for a certain method of safekeeping, as in a bank box, and merely allows the co-trustee exclusive access to the box or equal access with the passive trustee, it is not believed that there is any delegation of discretion. Merely acting as a depositary or holder of trust property under prescribed conditions is a mechanical process.

The question whether exclusive possession in one co-trustee is consistent with good business management, is conduct which the ordinarily prudent man would pursue in his own affairs, is different. Assuming that the colleague has a good reputation, that there is

[102] For discussions of the argument from convenience, see Cottam *v.* Eastern Co. Ry. Co., 1 Johns. & H. 243 (1860); Banks *v.* Wilkes, 3 Sandf. Ch. (N. Y.) 99 (1845); Miller *v.* Beverleys, 4 Hen. & M. (Va.) 415 (1809). In the latter case Taylor, Ch., said (p. 422): "Could it be supposed, that the three trustees, on every occasion, were to be convened to do every act, however unimportant, for the *cestui que trust*? Such a doctrine would be unreasonable in the extreme."

no warning of danger, as we must in this class of cases, is it a disregard of the rules of common prudence to consent to exclusive control by an associate? Two points must here be raised. Was there reason for entrusting exclusive possession to the co-trustee? Was the property entrusted such that the entrusting gave to the active trustee the *indicia* of sole and separate ownership or otherwise enabled him to pass title to a *bona fide* purchaser for value? If the surrender of possession to the associate trustee was unnecessary and had no reason behind it except the indifference and laziness of the passive trustee, it may well be held that such surrender was a lack of ordinary care.[103] And if the exclusive possession gave the active trustee the power, if he were dishonest, to transfer the trust *res* to a *bona fide* purchaser for value and defeat the trust, the conduct of the inactive trustee may well be treated as negligence. True, an inactive trustee is not bound to presume that his co-trustee is a rogue, but he is presumed to know the frailties of human nature and to realize that it is not good business to place temptation in the way of an associate or intermediary. If the trust property has no element of negotiability about it, and the entrusting will not hold the co-trustee out to the world as the sole beneficial owner, there would seem to be no lack of ordinary good judgment in allowing the co-trustee to take a position similar to that of a warehouseman or other bailee.

Such confusion as there is in the cases in this field seems to arise partly from the ignoring of the joint nature of the trust title and powers and the consequent difference between trusts and executorships, partly from the failure to realize that the problem of the inactive trustee's liability is merely one of the application of the "delegation" and "ordinary care" rules, and partly from other reasons. The attitude of the English courts has probably been softened by the lack of compensation of trustees in that country. The English trustee is in a position analogous to that of a bailee for the sole benefit of the bailor, who is held to the standard of slight care only. The trustee serving without compensation is held, of course, when he acts, to the care of a reasonably prudent man in his own affairs; but when he does not act, it is natural unconsciously to exercise leniency toward him. This reason for an attitude of

[103] The necessity of the transfer has been considered important by the New York courts. Purdy *v.* Lynch, 145 N. Y. 462, 40 N. E. 232 (1895).

indulgence toward the passive trustee has never existed to any appreciable extent in America,[104] and does not now exist in the British dominions,[105] but it still prevails in England except as to judicial and public trustees.[106] It may have had some influence in early cases.[107]

Furthermore, some courts have revolted at making the inactive trustee responsible because it would be mulcting one man for the wrong of another.[108] Such reasoning is fallacious, it is submitted, because the negligence or passivity of the inactive trustee is as much a cause of the loss as the fraud or negligence of the active trustee.[109] If the inactive trustee had not surrendered the trust property and management to his fellow trustee, the latter would never have had the opportunity of wasting or stealing the funds. As well say that a trustee who leaves trust money in a public place where it is stolen should not be liable because the crime of the thief was the cause of the loss, as to hold the inactive trustee innocent when his negligence has opened the door for a breach of trust by his co-trustee.

The responsibilities incident to the administration of trusts have not been appreciated by many trustees, and, it is submitted with respect, by some courts. The settlor and the *cestui que trust* have a right to expect that trustees who accept the trust will give the estate the benefit of their skill and honesty and not merely of their names. A trustee who cannot or will not participate should decline or resign the trust, instead of holding out false hopes to those interested in its performance. A strict enforcement of the "reasonable care" and "delegation" rules will expel the undesirable inactive trustee and aid in the conservation of trust estates.

George Gleason Bogert.

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[104] PERRY, TRUSTS, 6 ed., §§ 916, 917.

[105] BRIT. COL. TR. ACT, § 80; MAN. TR. ACT, § 49; NEW BRUNS. TR. ACT, § 44; NEWF. CONSOL. ST. 1892, chap. 84, § 22; NOVA SC. TR. ACT, § 55; ONT. TR. ACT, § 67; PRINCE EDW. ISL. L. 1902, chap. 12; QUEENSL. TR. & EX. ACT (1897), § 55; SASK. TR. ACT, § 50.

[106] 28 HALSBURY'S LAWS OF ENGLAND, 162, 212, 219; UNDERHILL, LAW OF TRUSTS AND TRUSTEES, 7 ed., art. 53.

[107] Litchfield *v.* White, 3 Selden (N. Y.) 438, 444 (1852); STORY'S EQ. JURISP., 13 ed., § 1268.

[108] See, for example, opinion of Finch, J., in Ormiston *v.* Olcott, 84 N. Y. 339, 346 (1881).

[109] Gainsborough *v.* Watcombe Terra Cotta Co., 54 L. J. Ch. 991, 996 (1885); Klatt *v.* Keuthan, 185 Mo. App. 306, 170 S. W. 374 (1914).